

**BEFORE THE
DEPARTMENT OF FOOD AND AGRICULTURE
OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal of:)

Javier Rodriguez)
761 South "E" Street)
Oxnard, CA 93030)

Appellant)
_____)

File No. 1415-CF 024

**DECISION AND ORDER
ON APPEAL**

**I.
STATEMENT OF THE CASE**

On March 18, 2015, the Los Angeles County Agricultural Commissioner/Director of Weights and Measures (hereinafter "Respondent"), formally issued a Notice of Proposed Action Grounds Therefore, and Opportunity to Be Heard (hereinafter "Notice") to Javier Rodriguez (hereinafter "Appellant") for one (1) count of violation of Title 3, California Code of Regulations, Section 1392.4 subdivision (a), which prohibits certified farmers from selling produce not of their own production. The Respondent sought to recover a civil penalty in the amount of six hundred (\$600) and to suspend Javier Rodriguez from participating in any California Certified Farmers' Markets (hereinafter "CFM") for a period of one (1) month.

Hearing Officer Greg Creekmur conducted the hearing on May 20, 2015, with both parties in attendance. Hearing Officer Creekmur determined that the Appellant had committed the violation and upheld the proposed penalty payment of \$600 and suspension from participation in any CFM for one month. On July 14, 2015, the Respondent adopted the decision as submitted. On July 17, 2015, the Appellant submitted an appeal to the Secretary of the Department of Food and Agriculture (hereinafter "the Department") on the basis that his actions were not intentional and therefore do not meet the definition of a serious violation, and that a suspension will cause an economic hardship.

**II.
STANDARD OF REVIEW**

The Department may not consider evidence outside the records, but must consider the entire record, and deny the appeal if there is any substantial evidence to support the findings. (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3rd 188, 198-199) Substantial evidence is defined as evidence of "ponderable legal significance" which is "reasonable in nature, credible and of solid value", distinguishable from the lesser requirement of "any evidence." (*Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 47; *Bowers v. Bernards* (1984) 150 Cal.App.3d

870, 873) In other words, the Department cannot substitute its judgment for the judgment of the finder of fact if there is enough relevant and reliable information to establish a fair argument in support of the result, even if other results might have also been reached. (*Smith v. County of Los Angeles*, *supra*; *Bowers v. Bernards*, *supra*, 10 Cal.App. 4th at 873-874)

III. STATEMENT OF FACTS

Javier Rodriguez is a certified producer and is authorized to sell for Lehr Brothers/Scott Pursell/dba Big L Packers, also a certified producer (Exhibit D and E).

On January 31, 2015, Ed Williams, Deputy Director Pest Exclusion/Produce Quality Bureau of Los Angeles County (hereinafter "Mr. Williams"), and Inspector Geoff Burch, inspected Javier Rodriguez's stall at the Calabasas Certified Farmers' Market. Inspector Williams observed lemons of what he identified to be the Eureka or Lisbon variety, for sale, sold under the Lehr Brothers Certified Producers' Certificate (hereinafter "certificate"). Mr. Williams verified that Lehr Brothers was only certified to sell Meyer lemons. (Hearing Testimony of Ed Williams)

At the time of inspection, Mr. Williams issued Notice of Violation #548904, to Javier Rodriguez, for having in possession and offering for sale lemons not listed on the certificate and for failure to separate and identify each producers' produce when selling. This violation is not part of the Notice, but prompts further investigation resulting in the county taking an action. (Exhibit N; Hearing Testimony of Ed Williams)

Lehr Brothers' certificate was issued by Kern County. On February 2, 2015, Los Angeles County Inspector Ibrahim Abdel-Fatah (hereinafter "Inspector Abdel-Fatah") contacted Lori Rogers, Agricultural Biologist/Weights and Measures Inspector III, Kern County Department of Agriculture and Measurement Standards (hereinafter "Inspector Rogers"), to verify that Lehr Brothers sold Eureka lemons. On February 3, 2015, Inspector Rogers responded that she had visited Lehr Brothers and relayed that Scott Pursel of Lehr Brothers told her they were growing a few Eureka lemon trees, and that they will arrange to amend their certificate (Exhibit J).

On February 6, 2015, following a site inspection for the certificate amendment, Inspector Rogers declined to amend the certificate as requested. She sent another email to Inspector Abdel-Fatah informing him that Pursel said they do have Lisbon lemons. But she emphasized that while Eureka and Lisbon lemons are similar, Eureka lemons prefer a coastal climate. She told Inspector Abdel-Fatah that she did not amend the certificate because the lemon trees were small and not in production. She additionally informed him that any fruit coming from Lehr Brothers would be sized and waxed. (Exhibit K) Rodgers took photographs of the trees that showed that they were too small to produce lemons. (Exhibit L)

On February 23, 2015, following the inspection of Lehr Brothers productions site by Inspector Rogers, Mr. Williams issued Notice of Violation #584907 to Lehr Brothers and Javier Rodriguez, for having in possession and offering for sale "lemons not of their own production or produced by second certificate holder and failure to keep records required for a period of 3 years." (Exhibit N)

Appellant testified in the hearing that the lemons were from Lehr Brothers and provided a letter written by Scott Pursel of Lehr Brothers stating that their trees are small, but they did have lemons that were cultivated, and confirmed they gave Javier Rodriguez lemons to sell (Exhibit 1).

Respondent sought the suspension and the imposition of the civil penalty because of a previous violation that was not contested by Appellant. Respondent concluded by stating that Appellant's violation was a serious one that justified both actions against Appellant. (Hearing Statement of Respondent Advocate Katherine Tanaka)

IV. DETERMINATION OF ISSUES

The Appellant has appealed the Respondent's decision to impose a civil penalty and to suspend its privilege to participate in any CFM pursuant to Food and Agricultural Code section 47025, subdivision (d). In reviewing the hearing decision, the Department has determined that there is sufficient evidence to support a finding that the Appellant violated Title 3, California Code of Regulations, section 1392.4, subdivision (a), selling produce not of his own production. The evidence, including a statement from Inspector Rogers stating that the Lisbon lemon trees are small and not in production, substantiated by photographs, is sufficient to conclude that the lemons sold at the Calabasas CFM were not of the certificate holders' own production.

Based upon such evidence, Respondent could suspend Appellant's participation in a CFM for a month. (Tit. 3, Cal. Code Regs, sec. 1392.10, subd. (c)) Respondent could also impose a civil penalty in the amount of \$600. (Food & Agric. Code, sec. 47025; Tit. 3, Cal. Code Regs., section 1392.4.1) Selling produce not of one's own production is a serious, intentional violation of the Direct Marketing program in which a civil penalty in an amount between \$401 and \$1000 may be imposed. (Tit. 3, Cal. Code Regs., sec. 1392.4.1, subd. (c), Table A) Respondent may also impose a civil penalty in an amount between \$401 and \$1000 for repeat violations, as occurred in this instance as well. (Tit. 3, Cal. Code Regs., sec. 1392.4.1, subd. (a)) (1))

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**V.
DECISION**

Considering all of the evidence in the record, the Department denies Javier Rodriguez's appeal of the Los Angeles County Agricultural Commissioner/Director of Weights and Measures' Decision and Order. Appellant is ordered to pay a fine of six hundred dollars (\$600) for one count of a violation of Title 3, California Code of Regulations, section 1392.4, subdivision (a) and is suspended for one (1) month from participation in any California Certified Farmers' Market.

This Decision and Order shall be effective September 10, 2015.

IT IS SO ORDERED this 10th day of September, 2015.



RICHARD ESTES
Staff Counsel
California Department of Food and Agriculture

APPELLANT'S RIGHT TO SEEK JUDICIAL REVIEW

Judicial review of the decision of the Department may be sought within thirty (30) days of the effective date of this decision pursuant to Section 1094.5 of the California Code of Civil Procedure.